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The Role of the EU in Promoting International Standards in the Area of Climate Change

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Abstract

The aim of this piece is to assess whether and to what extent the European Union can be considered a world leader in stimulating the development of international climate change standards through a variety of international organizations and processes as a way of spurring necessary international cooperation. It will argue that given slow progress towards an effective global response to the climate change challenge through multilateral cooperation, the EU has been trying to develop climate change standards internally or in cooperation with third countries, arguably in order to promote the acceptance of such standards by the competent international organizations, or at least create a critical mass of countries engaging in climate action (minilateralism). The paper will conclude by considering the legitimacy issues arising from this multi-faceted strategy of the EU in promoting international climate change standards.

Keywords

Bilateralism; climate change; EU; external action; minilateralism; multilateralism; REDD; biodiversity; aviation.

THE ROLE OF THE EU IN PROMOTING INTERNATIONAL STANDARDS IN THE AREA OF CLIMATE CHANGE

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Keywords: bilateralism; climate change; EU; external action; minilateralism; multilateralism; REDD; biodiversity; aviation.

Introduction

It is no secret that climate change is considered the most severe contemporary environmental challenge, and that it has transcended the realm of global environmental policy and law by being gradually conceived as a key threat to global security.¹ The EU has been actively promoting the multilateral recognition of climate change as a global environmental and security emergency.² It has also attempted to play a global leadership role in the battle against climate change since the early days of international cooperation around the issue.³ The objective of combatting climate change has recently been given also a legal formulation in the Treaty of Lisbon where it is listed as one of the objectives of EU environmental policy.⁴

The aim of this piece is to assess whether and to what extent the European Union (EU) can be considered a world leader in stimulating the development of international climate change standards through a variety of international organizations and processes as a way of spurring necessary international cooperation. It will argue that given slow progress towards an effective global response to the climate change challenge through multilateral cooperation, the EU has been trying to develop climate change standards internally or in cooperation with third countries. The key motivation has arguably been to promote the acceptance of such standards by the competent international organizations, or at least create a critical mass of countries engaging in climate action (minilateralism⁵). The paper will conclude by considering the legitimacy issues arising from this multi-faceted strategy of the EU in promoting international climate change standards.

¹ Notably at the 2005 UN World Summit. See discussion in Elisa Morgera “The 2005 UN World Summit and the Environment: The Proverbial Half-Full Glass” (2006) 15 *Italian Yearbook of International Law*, 53. More recently, climate change has also become an issue of discussion within the UN Security Council: Francesco Sindico, “Climate Change: A Security (Council) Issue?” (2007) 1 *Carbon and Climate Law Review*, 26.

² Elisa Morgera and Gracia Marín Durán, “The UN 2005 World Summit, the Environment and the EU: Priorities, Promises and Prospects” (2006) 15 *RECIEL*, 1.

³ Kati Kulovesi, “Climate Change in EU External Relations: Please Follow my Example (or I might Force You To)” in Elisa Morgera (ed), *The External Environmental Action of the European Union: EU and International Law Perspectives* (CUP, 2012).

⁴ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47, Article 191(1).

⁵ The term is used by Scott Barrett, *Why Cooperate? The Incentives to Supply Global Public Goods* (OUP, 2007). It has also been discussed in Kati Kulovesi, “Addressing Sectoral Emissions outside the UNFCCC: What Roles for Multilateralism, Minilateralism and Unilateralism?” (2012) 21 *RECIEL*, 193.

The trajectory of the EU's strategy in promoting international climate change standards

In keeping with its leadership aspirations, the EU has attempted to use its influence to strengthen the multilateral framework for climate change mitigation under the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol.⁶ At the same time, it has sought to lead the global battle against climate change 'by example' through innovative internal climate policies and legislation.⁷ Since the late 1990s, the EU has developed a rather comprehensive body of climate change law and policy. The key elements include the EU Emissions Trading Scheme (ETS) and the 20-20-20 by 2020 goal, in other words, 20%-targets for emission reductions, and for increasing energy efficiency and renewable energy by 2020.⁸

Despite efforts by the EU and several others, including developing countries that are particularly vulnerable to the negative impacts of climate change, progress made under the UNFCCC and other multilateral fora is far from adequate to prevent dangerous climate change. The 2°C target (the objective of limiting global average temperature increase to 2°C from pre-industrial times) has formed the cornerstone of the EU climate policy since 1996, and in 2010, this objective was also formally adopted by the 195 Parties to the UNFCCC. The 2°C target is, however, in grave danger of slipping out of reach. The UN Environment Programme has estimated that there is a gap of six to eleven gigatons of carbon dioxide equivalent between the emission reductions required by 2020 to meet the 2°C target, and the emission reductions pledged by countries at the inglorious 2009 UN Climate Change Conference in Copenhagen.⁹ Continuing with the current climate policies is likely to result in global average temperature increase of more than 3°C by the end of the century,¹⁰ estimated to bring about severe environmental, economic, social and security consequences.

Given inadequate progress through multilateral cooperation over the past two decades, the EU is increasingly attempting to influence external developments and global climate policy through its internal legislation.¹¹ In other words, the EU has begun crafting its legislation in such a way that aims to promote the development of international climate change standards at the multilateral level. In certain cases, the EU has also made access to its large and influential market contingent on compliance

⁶ Kulolesi, "Climate Change in the EU External Relations", n. 3 above.

⁷ Ibid.

⁸ The history of these targets has been explained in detail in Kati Kulolesi, Elisa Morgera and Miquel Muñoz: "Environmental Integration and Multifaceted International Dimensions of EU Law: Unpacking the 2009 Climate and Energy Package" (2011) 48 *Common Market Law Review*, 829.

⁹ UNEP, *Bridging the Emissions Gap. A UNEP Synthesis Report* (UNEP, 2011), 8.

¹⁰ See 'The Climate Action Tracker', an independent science-based assessment, which tracks emissions commitments and actions by countries <<http://www.climateactiontracker.org/>> accessed 07 May 2013.

¹¹ Scott and Rajamani have characterized the EU's approach as 'contingent unilateralism' in Joanne Scott and Lavanya Rajamani, "EU Climate Change Unilateralism" (2012) 23 *European Journal of International Law*, 469. They explain that 'contingent unilateralism' includes two elements: "the application of EU climate change law to greenhouse gas emissions that are generated abroad" and that the "geographical extension contingent in the sense that the EU may agree to waive the external application of its climate change law if adequate international or third country climate change regulation has been put in place." Ibid., at 469-470.

with its climate standards. In this sense, the EU is using a novel mixture of multilateral negotiating positions and internal regulatory approaches that seek to export the EU's approach,¹² as well as bilateral and inter-regional cooperation with partner countries.¹³

One of the first examples – and a highly controversial one – of the EU's reliance on its internal climate legislation to influence external developments was its decision in 2008 to include emissions from both domestic and foreign airlines in the EU ETS.¹⁴ This was followed by a variety of measures included in the 2009 Climate and Energy Package, a comprehensive set of legal acts designed to implement the 20-20-20 by 2020 targets. Key elements of the Package include a revised ETS Directive, a new Directive on all forms of renewable energy (including biofuels), an effort-sharing Decision on the Member States' emissions reductions outside the emissions trading sector,¹⁵ a Directive setting up the legislative framework for carbon capture and storage (CCS) and a Regulation seeking to reduce CO₂ emissions from passenger cars. In early October 2012 the EU also adopted a Directive on energy efficiency to complement the package.

As we have argued elsewhere, the 2009 Climate and Energy Package includes many innovative elements, some of which also aim to influence developments outside the EU.¹⁶ For example, the revised ETS Directive increased opportunities for the EU to try to expand the carbon market by linking the ETS with trading schemes established by third countries.¹⁷ These changes are in line with the EU's desire to create a global carbon market through interlinked emissions trading schemes. The creation of a global carbon market would be important for an effective carbon price signal and for reducing the risk of carbon leakage. Revisions to the ETS Directive also contributed to the ongoing international debate on climate finance, structured around the commitment by developed countries under the UNFCCC to jointly mobilize USD 200 million of climate finance annually by 2020 from multiple sources. The Package contributed to this debate by changing the rules for allocating emission allowances to installations participating in the ETS so that auctioning will gradually become the main method of allocation. The Directive indicates that the Member States should use at least 50% of the auctioning revenues, or an equivalent amount, for activities related to climate change mitigation and adaptation within the EU and internationally.¹⁸ The Commission's original proposal would have introduced a binding obligation to earmark auctioning revenues for climate finance, but this was unacceptable for the

¹² Hans Vedder, "Diplomacy by Directive: an Analysis of the International Context of the Emissions Trading Directive" in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders - Policy Interconnections Between the EU and the Rest of the World* (Hart, 2011).

¹³ Kulovesi, Morgera and Muñoz, n. 8 above.

¹⁴ For comprehensive discussion, see Kati Kulovesi, "Make Your Own Special Song even if Nobody Else Sings Along: International Aviation Emissions and the EU Emissions Trading Scheme" (2011) 2 *Climate Law*, 535.

¹⁵ Commission, "Proposal for a Decision of the European Parliament and of the Council on the Effort of Member States to Reduce Their Greenhouse Gas Emissions to Meet the Community's Greenhouse Gas Emission Reduction Commitments up to 2020" COM (2008) 17.

¹⁶ For comprehensive analysis, Kulovesi, Morgera and Muñoz, n. 8 above.

¹⁷ Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community, (2009) OJ L L140/63, Article 25(1)(a).

¹⁸ *Ibid.*, Article 10(3).

Member States.¹⁹ While drafted in non-binding language, the climate finance provisions in the ETS Directive represent the first innovative example of how market-based mechanisms can be used to generate climate funding for both domestic and international purposes.

Furthermore, the Package also introduced sustainability criteria for both European and imported biofuels to protect high-value biodiversity land and high-value carbon-stock land as well as seeking to ensure substantial reductions in greenhouse gas emissions from biofuels. The criteria have thus been unilaterally set by the EU, but were expressly based on international reference documents.²⁰ Notably, the Directive indicates that the EU will endeavour to conclude bilateral or multilateral agreements with third countries containing provisions on the sustainability criteria.²¹

The EU has also prominently mainstreamed climate change into the unilateral and bilateral tools of its external relations. Specific climate change cooperation clauses have been inserted in recent bilateral/inter-regional agreements between the EU and its partner countries, containing a commitment to cooperate on trade-related aspects of the *future* international climate change regime.²² Financial and technical assistance offered by the EU to partner countries also specifically targets various issues related to ongoing multilateral negotiations, such as the reform of the Kyoto Protocol's Clean Development Mechanism (CDM), adaptation, low-emissions development strategies and new market mechanisms.²³ Progress in the long-term climate change negotiations has also been addressed through various policy dialogues between the EU and its partner countries²⁴ and been institutionalised in climate-specific cooperation and dialogue initiatives, such as the Global Climate Change Alliance.²⁵ Successful instances of these dialogues served to agree on specific common priorities between the EU and partner countries in anticipation of multilateral environmental negotiations sessions.²⁶

¹⁹ See Kulovesi, n. 14 above, at 555.

²⁰ Directive (EC) 2009/28 of the European Parliament and of the Council on the promotion of the use of energy from renewable sources [2009] OJ L140/16 (Renewables Directive), preambular paras. 69, 73 and 77.

²¹ *Ibid.*, Article 18(4).

²² E.g. Free Trade Agreement between the EU and its Member States, on one side, and Colombia and Peru, on the other [2012] OJ L354/3, (COPE FTA), Article 63, ; Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, 6 October 2010, [2011] OJ L127/4 (South Korea FTA), Article 13.5(3).

²³ Commission, "Environment and Natural Resources Thematic Programme – 2011–2013 Strategy Paper and Multiannual Indicative Programme" (ENRTP Strategy 2011–13), 29 October 2010, 9 and 13.

²⁴ E.g., Joint Africa-EU Action Plan 2011-2013, Partnership on Climate Change and Environment: Third EU-Africa Summit, Joint Africa-EU Strategy Action Plan (2011–2013), Tripoli 30 November 2010.

²⁵ See: <www.gcca.eu>. For a discussion, Gracia Marín Durán and Elisa Morgera *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart, 2012), 229.

²⁶ E.g., EU-Africa Summit, "First Action Plan (2008–2010) for the Implementation of the Africa-EU Strategic Partnership" (undated), para. 8(iii), <www.ec.europa.eu/development/icenter/repository/EAS2007_action_plan_2008_2010_en.pdf> accessed 07 May 2013; and 12th Africa-EU Ministerial Troika Meeting, "Communiqué" Luxembourg 28 April 2009, with section Ib, titled "Climate change agenda: preparing the Copenhagen conference"; 19th EU-Japan Summit, "Joint Press Statement" Tokyo 28 April 2010, para. 12 and Annex, section 2. See discussion in Marín Durán and Morgera, n. 25 above, at 231-232.

As the above overview shows, climate change has indeed become the most prominent example of the EU's deployment of a vast array of unilateral and bilateral, legal and quasi-legal instruments in its external relations to influence multilateral environmental standard-setting.²⁷ Some of the measures it has adopted seek to provide leadership by example and to disseminate information from regulatory innovations, hoping that this will be inspire other countries to adopt similar measures in their national legal systems. Some climate measures implemented by the EU, however, are mandatory and condition market-access to the EU, most notably the aviation scheme.²⁸ Others can be characterized as something in between, as in the case of the EU biofuels sustainability criteria. In this respect, the EU is allowing all biofuels to enter its market, but has created disincentives for those that do not respect the EU sustainability standards: only biofuels that fulfill the sustainability criteria will be counted against the 10% target.²⁹

This overview goes to show that the EU has been experimenting with different strategies to support the development of global climate change standards. The effectiveness of these efforts in terms of promoting global climate change standards remains, however, questionable. It is therefore not yet possible to determine which approaches may have been more successful than others. It seems therefore useful to draw an initial typology of EU approaches in this regard:

Examples of EU measures	Key characteristics	International climate change standard concerned
ETS	<ul style="list-style-type: none"> • Market mechanism • Sanctions • Unilateral standard-setting 	<ul style="list-style-type: none"> • Climate funding • Global carbon market • Sustainability standards for carbon credits • Aviation emissions at ICAO
Biofuels sustainability criteria	<ul style="list-style-type: none"> • Unilateral standard-setting (based on global references) • Incentive-based (market) approach • Certification (verification?) • Dialogue about monitoring 	<ul style="list-style-type: none"> • CBD and biofuels
CCS Directive	<ul style="list-style-type: none"> • Unilateral standard setting (based on global references) • Opportunities for bilateral cooperation 	<ul style="list-style-type: none"> • Inclusion of the CCS in the CDM
FLEGT	<ul style="list-style-type: none"> • Bilateral negotiations • standard-setting based on third 	<ul style="list-style-type: none"> • REDD+ • REDD+ safeguards

²⁷ This practice is analysed in detail in Marín Durán and Morgera, n. 25 above.

²⁸ On this, see Scott and Rajamani, n. 11 above, at 475-476.

²⁹ There has been some discussion as to whether the biofuels sustainability criteria – targeting principally the way in which biofuels entering the EU market rather than the product itself - is compatible with the market-access requirements under World Trade Organization (WTO) law. This is discussed in Kulovesi, Morgera and Munoz, n. 8 above, at 882-884.

	country national standards and global references <ul style="list-style-type: none"> • Incentive-based (market) approach • Involvement of international organizations 	under the CBD
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The EU and support for climate change through multilateralism and bi/minilateralism

Our argument here is that it is necessary to assess these efforts against the EU's Treaty-based objective to promote measures at the international level to combat climate change,³⁰ to promote an international system based on strong multilateral *environmental* cooperation and good global *environmental* governance,³¹ and generally to "promote multilateral solutions to common problems, in particular in the framework of the United Nations."³² The key question is whether the various mini-lateral and unilateral strategies deployed by the EU succeed in promoting multilateral environmental cooperation and governance, and whether such independent action can be deemed as legitimate from the point of view of the international community. In this regard, it is necessary in our view to assess the EU's complex strategy to influence the development of international climate change standards from the standpoint of its compatibility with general international law and international environmental law. As to the latter point, it is necessary to expand the scope of the enquiry to the EU's impacts on various international processes (be they multilateral, bilateral or mini-lateral) that are directly or indirectly linked to global climate change standard-setting.

First, the EU has actively supported the development of international climate change law multilaterally under the UNFCCC. Originally the strongest supporter of the Kyoto Protocol among developed countries, it has also consistently advocated a 'Kyoto-style' strong international legal framework, structured around legally-binding mitigation commitments and a robust compliance mechanism, in the negotiations concerning the long-term future of the UNFCCC regime. Concerning the various detailed aspects of climate policy discussed under the UNFCCC, the EU has sought to actively provide intellectual input to the process, sharing its experiences and analysis on mitigation, adaptation, finance, technology and so on.

Second, the EU is promoting climate-related proposals in various multilateral fora outside the UNFCCC. For example, it advocates the adoption of market-based measures under both, the International Civil Aviation Organization (ICAO) and International Maritime Organization (IMO) in order to curtail the rapidly growing greenhouse gas emissions from international aviation and maritime transport. The EU is also promoting safeguards for REDD+ (Reducing Emissions from Deforestation and forest Degradation in developing countries; and the role of conservation,

³⁰ Article 191(1) TFEU.

³¹ Consolidated Version of the Treaty on the European Union (TEU) [2010] OJ C83/13, 30 March 2010, Article 21(2)(h) TEU, read in conjunction with the above-mentioned provisions and Article 11 TFEU on environmental integration ("Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.")

³² Article 21(1), second sentence TEU.

sustainable management of forests and enhancement of forest carbon stock in developing countries) and for biofuels in negotiations under the Convention on Biological Diversity (CBD), with a view to injecting exogenous standards into the international climate change negotiations.³³

Third, the EU is seeking to promote the expansion and strengthening of climate change law through various unilateral and bilateral settings. It is, for example, engaged in plans to link its ETS with other emissions trading schemes, including the Australian one. The EU has also given financial support, for example, to China to develop its domestic emissions trading schemes.³⁴ In addition, the EU is providing bilateral assistance to developing countries to support their implementation of the international climate change regime. Although the overall amount of resources allocated to the environmental cooperation by the EU remains modest,³⁵ climate change receives top priority for cooperation under the 2011-2013 EU environmental thematic funding (indicatively allocated €237.5 million, amounting to nearly 47% of the total budget),³⁶ with emphasis being placed on climate change adaptation³⁷ (including through the Global Climate Change Alliance), climate change mitigation³⁸ (in particular through reducing emissions from deforestation and forest degradation, low-emission development strategies, and technology transfer), and promoting investments in sustainable energy options.³⁹ Another priority area of external funding is to strengthen international climate change governance (indicatively allocated €39 million),⁴⁰ in order for it to be “*shaped* by the external dimensions of the EU’s climate change policies (emphasis added)”.⁴¹ This is specifically geared at supporting the work of the UNFCCC Secretariat, developing countries’ participation in multilateral negotiations; and implementation of and compliance with multilateral environmental

³³ The Council of the EU urged, in preparation for the CBD COP 11, “the CBD and its Parties to contribute actively to the development and implementation of biodiversity safeguards under REDD+ 3 as a crucial opportunity for cooperation between the CBD and the United Nations Framework Convention on Climate Change (UNFCCC); and ENCOURAGES the use of indicators and other mechanisms to assess the impacts of REDD+ measures on biodiversity.” Council, Conclusions on Biological Diversity and Biosafety, 11 June 2012, para. 7, <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/130787.pdf> accessed 07 May 2013. The REDD+ case is discussed in detail infra. As to biofuels, see Elisa Morgera, “Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU’s External Environmental Action” in Bart Van Vooren, Steven Blockmans, and Jan Wouters (eds), *The EU’s Role in Global Governance: The Legal Dimension* (OUP, 2013), 201-203.

³⁴ EU-China Summit Press Release, 20 September 2012, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/132478.pdf> accessed 07 May 2013.

³⁵ As recognized by the Commission itself: the yearly average financial commitments by the EU for the environment over the period 2007-2010 was around €295 million, representing roughly 4.3% of all EU external assistance. European Commission Working Paper, “Improving Environmental Integration in Development Cooperation” SEC (2009) 555 final, at 4. See further, Gracia Marín Durán, “Environmental Integration in EU Development Cooperation: Responding to International Commitments or Its Own Policy Priorities” in Morgera, *The External Environmental Policy of the European Union*, n. 3 above.

³⁶ ENRTP Strategy 2011-2013, 20-23 and 28.

³⁷ The indicative allocation for climate change adaptation is €75 million, ENRTP Strategy 2011-2013, 28.

³⁸ The indicative allocation for climate change mitigation is €115 million, ENRTP Strategy 2011-2013, 28.

³⁹ The indicative allocation for sustainable energy is €47.5 million, ENRTP Strategy 2011-2013, 28.

⁴⁰ Ibid., 26 and 28.

⁴¹ Ibid., 25.

agreements (MEAs). More recently, the European Commission has proposed to establish close interlinkages between climate change, biodiversity and development funding, as a pragmatic effort to make the most of high-profile climate finance⁴² internally and externally,⁴³ and support ‘climate-proof’ development.⁴⁴

This paper will focus on two key examples on how the EU tries to promote international standards to tackle the global climate change challenge through a variety of instruments and in a variety of international fora. The two examples relate respectively to the REDD+ and carbon trading.

First case study: REDD+

Forests currently contribute about one-sixth of global greenhouse gas emissions when cleared, overused or degraded, and have the potential to absorb about one-tenth of global carbon emissions projected for the first half of this century into their biomass, soils and products and store them - in principle in perpetuity.⁴⁵ Forests, however, also provide several other important environmental and socio-cultural functions that have dominated the international debate on sustainable forest management since the 1992 Rio Summit on the Environment and Development.⁴⁶ Sustainable forest management has been a long-standing international concern for the EU and, as such, the EU has supported addressing at the multilateral level through the development of a legally binding agreement on forests⁴⁷ both at the global⁴⁸ and regional levels.⁴⁹ At the unilateral and bilateral levels, the EU has provided early and consistent external funding for the protection of tropical forests.⁵⁰

⁴² Ibid., 17. This paragraph summarizes relevant findings on EU external funding of Marín Durán and Morgera, n. 25 above, Ch. 4.

⁴³ See generally, Kulovesi, Morgera and Muñoz, n. 8 above.

⁴⁴ Commission, “Green Paper on EU development policy in support of inclusive growth and sustainable development – increasing the impact of EU development policy” COM (2010) 629 final, 17.

⁴⁵ FAO, “Role of Forests in Climate Change” (undated) <<http://www.fao.org/forestry/climatechange/53459/en/>> accessed 07 May 2013.

⁴⁶ Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests (Forest Principles), 31 ILM 881 (1992).

⁴⁷ Gunilla Reischel, “The EU and the UN Forest Negotiations: A Case of Failed International Environmental Governance?” (Marie Curie European Summer School on Earth System Governance, Vrije Universiteit, Amsterdam, 24 May- 6 June 2007) <www.2007amsterdamconference.org/Downloads/07SummerSchool%20-%20Reischl.pdf> accessed 07 May 2013.

⁴⁸ The EU advocated the development of a global, legally binding instrument on forests at the United Nations Forum on Forests, e.g. Earth Negotiations Bulletin, Summary of the Fifth Session of the United Nations Forum on Forests, (2005) Volume 13, No. 133, 4 <<http://www.iisd.ca/forestry/unff/unff5/>> accessed 07 May 2013.

⁴⁹ During the Forest Europe Ministerial Conference, held in Oslo, Norway, from 14-16 June 2011, ministers of European countries and representatives of the EU adopted a mandate for negotiating a legally binding agreement on forests in Europe by 2013: see Oslo Ministerial Mandate for Negotiating a Legally Binding Agreement on Forests in Europe, 16 June 2011, <www.foresteuropa2011.org/pop.cfm?FuseAction=Doc&pAction=View&pDocumentId=29800> accessed 07 May 2013.

⁵⁰ Regulation 2494/2000 of the European Parliament and of the Council on Measures to Promote the Conservation and Sustainable Management of Tropical Forests and Other Forests in Developing Countries [2000] OJ L288/6; DCI Regulation, Articles 6(e) and 7(e)

More recently, the EU has sought to promote a global approach to deforestation through a combination of EU internal legislation with extraterritorial implications and external relations tools. Notably, the EU has been very explicit in linking these efforts to its multilateral agenda. At the internal level, the EU has first developed an action plan and then enacted a series of regulations to tackle this global problem in the immediate term, in the face of limited progress at the global level.⁵¹ The EU approach is based on global soft-law commitments,⁵² and is made clearly compatible with ongoing, albeit partial, multilateral efforts.⁵³ This approach clearly emphasises the ultimate aim of leading to the development of multilateral consensual measures to address deforestation by exporter and importer countries, step by step through a multilateral instrument or the linking of regional agreements.⁵⁴

Deforestation issues, however, are increasingly addressed under the UNFCCC under the so-called REDD+ item.⁵⁵ This international development has led the EU to use its external relations to influence those ongoing negotiations. Thus, the EU has included references to REDD+ in its recent bilateral agreements⁵⁶ and its 2011-2013 strategy for environment thematic funding.⁵⁷ Given that sustainable forest management and

⁵¹ Commission, “Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an Action Plan” COM (2003) 251 final, 3 (FLEGT Action Plan). The FLEGT Action Plan was endorsed by the Council, “Conclusions - Forest Law Enforcement, Governance and Trade (FLEGT)” [2003] OJ C268/1.

⁵² World Summit on Sustainable Development, “Johannesburg Plan of Implementation” (4 July 2002) UN Doc A/CONF.199/20, Resolution 2, 5.

⁵³ Namely, timber species listed under the Convention on International Trade in Endangered Species (Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243); see FLEGT Action Plan, 20. The Plan also points to the need to advance work in the framework of the UN Security Council to define “conflict timber” as timber traded by armed groups and the proceeds of which are used to fund armed conflict, with a view to exploring the possible set-up of an international process similar to the Kimberly Process for diamonds. *Ibid.*, 21.

⁵⁴ FLEGT Action Plan, 9 and 11.

⁵⁵ REDD+ means ‘reducing emissions from deforestation and forest degradation, conservation of forest-carbon stocks, sustainable management of forests, and enhancement of forest-carbon stocks.’ This item was first officially incorporated in the agenda of the multilateral climate change negotiations in 2007 (UNFCCC COP, Decision 1/CP.13 “Bali Action Plan” (2008) UN Doc FCCC/CP/2007/6/Add.1, para. 1(b)(iii); and UNFCCC COP Decision 2/CP.13, “Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action” (2008) UN Doc FCCC/CP/2007/6/Add.1, para. 3, and more recently UNFCCC COP Decision 1/CP.16, “Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention” (2011) UN Doc FCCC/CP/2010/7/Add.1, at III.C: Policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries; and Annexes I-II. For a discussion of legal issues related to REDD+, see Harro van Asselt, “Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regime” (2012) 44 *NYU Journal of International Law and Politics*, 1205; and Annalisa Savaresi, “Reducing Emissions from Deforestation in Developing Countries under the UNFCCC. Caveats and Opportunities for Biodiversity” (2012) 21 *Yearbook of International Environmental Law* 81.

⁵⁶ Agreement Establishing an Association between the EU and its Member States, on the one hand, and Central America on the other, 22 March 2011, Article 20
<http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147660.pdf> accessed 07 May 2013; COPE FTA, Article 286; Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part and the European Community and its Member States of the other, signed in Cotonou on 23 June 2000, (Cotonou Agreement), Article 32bis
<http://ec.europa.eu/europeaid/where/acp/overview/documents/devco-cotonou-consol-europe-aid-2012_en.pdf>, accessed 07 May 2013.

⁵⁷ ENRTP Thematic Strategy 2011-2013, 21-22.

REDD+ face similar challenges related to participatory approaches to forestry and the role of forest-dependent communities, the EU is also considering using lessons learnt in the context of its Forest Law Enforcement, Governance and Trade (FLEGT) initiative⁵⁸ to provide inputs into multilateral negotiations on REDD+. ⁵⁹ This would include both key concepts related to forest governance emerging from FLEGT policies and activities,⁶⁰ as well as the practical insights emerging from the FLEGT multi-stakeholder processes leading to the conclusion of forest-specific bilateral agreements (called Voluntary Partnership Agreements or VPAs).⁶¹ This is particularly significant as it has proven particularly complex to ensure mutual supportiveness between climate change mitigation objectives, on the one hand, and biodiversity conservation and respect for the human rights of forest-dwelling communities on the other hand⁶² in the multilateral negotiations on REDD+.

What is also noteworthy in the FLEGT initiative is the cooperative approach pursued, relying on the forest-related legislation of the exporting country, in the absence of an international treaty of reference. This arguably aims to ensure the third country's ownership of the initiative, as well as demonstrate respect for its national sovereignty over its forest resources.⁶³ This is then coupled with a commitment from the third country to review its national legal framework when it does not support *sustainable* forest management,⁶⁴ thus opening the door for a bilateral dialogue on the definition of this concept using national legislation of the third country as a departure point.⁶⁵ As an incentive for countries to conclude VPAs, a recent EU Regulation establishes a presumption of compliance with the due diligence requirement for timber originating from a VPA country.⁶⁶ It can therefore be argued that the EU has put in place an

⁵⁸ FLEGT Action Plan, 3.

⁵⁹ For a more detailed discussion, see Annalisa Savaresi, "EU External Action on Forests: FLEGT and the Development of International Law" in Morgera, *The External Environmental Policy of the European Union*, n. 3 above.

⁶⁰ FLEGT Action Plan, 3 and 5.

⁶¹ The EU 2005 FLEGT Regulation Setting up a Licensing Scheme for Imports of Timber Based on Bilateral Agreements (Regulation 2173/2005, [2005] OJ L347/1) called for VPAs to be concluded between the EU and timber-exporting third countries. The verification of the legality of harvests of timber imported into the EU is to be checked against compliance with the national law of the third State 'as set out in the VPA' – the latter reference points to a joint evaluation by the third country and the EU of the alignment of third-country national forest law with relevant multilateral standards. The VPA negotiations notably touch upon all elements of sustainability: they thus emphasize the links between disparate pieces of national law that are needed to achieve sustainable forest management on the ground.

⁶² This relates to the international debate on the so-called 'safeguards' for REDD-plus concerning biodiversity and forest-dependent communities. Council, "Conclusions on the Convention on Biological Diversity: Outcome of and Follow-up to the Nagoya Conference (11-29 October 2010)", 20 December 2010, para. 21, where Member States and the Commission are invited to "actively contribute to the preparation of advice on the application of relevant safeguards for biodiversity in relation to REDD+, in line with the (CBD) COP 10 decision, and facilitate the development and implementation of such safeguards under REDD+." This is already the case for the EU-Africa partnership: e.g. Third EU-Africa Summit, "Joint Africa-EU Strategy Action Plan" (2011-2013) Tripoli 30 November 2010, 51-53.

⁶³ See Forest Principles, para. 1a.

⁶⁴ FLEGT Action Plan, 5.

⁶⁵ See for instance, the case of the VPA between the EU and the Republic of Ghana (20 November 2009) <www.illegal-logging.info/uploads/SignedAgreementECGhanaFLEGTEN.pdf> accessed 07 May 2013.

⁶⁶ Regulation (EU) 995/2010 of the European Parliament and of the Council Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market [2010] OJ L295/23,

incentive-based approach to joint standard-setting with partner countries.⁶⁷

Significantly, the EU has also involved an independent, specialized international organization, namely the UN Food and Agriculture Organization (FAO) in its FLEGT initiative. FAO is managing a global project funded by the EU to support African, Caribbean and Pacific countries in the review of their legislation and upgrading of their forest governance and law enforcement capacities.⁶⁸ This element is particularly significant for the legitimacy and credibility of the EU initiative, due to the fact that FAO has a long-standing and well-respected tradition of providing expert and independent advice on the reform of national forest laws.⁶⁹ Notably, FAO has recently announced that it is exploring synergies between FLEGT and REDD+.⁷⁰ This is particularly interesting because the EU appears to involve an intergovernmental organization in its bid to influence multilateral standard-setting by linking experience on the ground and global negotiations in different fora (notably, the CBD).

On the operational level, it has been underscored that FLEGT and REDD+ face similar challenges during their design and implementation phases, such as unclear legal frameworks, poor information systems, weak governance, corruption and limited capacities.⁷¹ It has also been reported that interactions between the two processes have gradually emerged, although in forms varying from country to country. These interactions reportedly concern the stakeholder dialogue at national and local level, capacity building, and forest monitoring.⁷² Notably for present purposes interactions also include the review of the legal framework done in the context of the FLEGT VPA, which may inform national debates on securing REDD+ incentives through legal reform and establishing REDD+ safeguards.⁷³

Whether FLEGT can effectively provide useful inputs into multilateral negotiations on REDD+ remains to be seen, and some commentators have cautioned against overestimating FLEGT's potential to support REDD+ negotiations, particularly

Articles 3-4. The legitimacy of the FLEGT approach was discussed in Morgera, "Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action", n. 33 above, 203-207.

⁶⁷ Morgera, "Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action", n. 33 above, 207-208.

⁶⁸ See <www.fao.org/forestry/acp-flegt/en> accessed 07 May 2013. Note that while there is no formal link between the FAO FLEGT Programme and the VPAs, FAO assistance specifically targets countries depending on "their level of interest in the FLEGT Action Plan and in negotiating a VPA" through support for national and regional FLEGT/VPA workshops to share information, knowledge and lessons learnt, feasibility studies on VPA-related issues; and support for national multi-stakeholder committees in charge of VPA negotiations and for the participation of local stakeholders: FAO, *Improving Forest Governance in Africa, the Caribbean and the Pacific* (undated) 6 and 9, <foris.fao.org/static/data/acpflegt/4087ForestGovernance_EN.pdf> accessed 07 May 2013.

⁶⁹ See FAO Legal Office, "Legal Advisory Services: Forestry and Wildlife", at <<http://www.fao.org/legal/development-law/forestry-wildlife-and-national-parks/en/>> accessed 07 May 2013.

⁷⁰ Earth Negotiations Bulletin, CBD COP 11 Highlights, Volume 09, No. 587, 10 October 2012, <<http://www.iisd.ca/vol09/enb09587e.html>> accessed 07 May 2013.

⁷¹ Valérie Merckx, Christophe Van Orshoven and Alessandro Trevisan, "FLEGT et REDD+: Interactions and Challenges" presentation at the Second EU REDD+ Projects Coordination Meeting, 3-4 July 2012, Brussels, Belgium, <http://www.efi.int/files/attachments/euredd/120703_redd_and_flegt_-_interaction_and_challenges.pdf> accessed 07 May 2013.

⁷² Ibid.

⁷³ Ibid.

because of the different focus of the two processes and risk of the duplication of efforts.⁷⁴ While both FLEGT and REDD+ support governance reforms and include some forms of compliance verification, REDD+ has a broader scope of action to comprehensively tackle forest loss in the tropics by addressing not only deforestation caused by illegal timber trade, but also forest loss caused by agricultural expansion, mining or domestic demand for fuel-wood.⁷⁵ Nonetheless, REDD+ processes could also benefit from experience accrued through FLEGT-related mechanisms for monitoring, reporting and verification, as well as the definition of social safeguards (notably related to the human rights of indigenous and local forest-dwellers) that have hindered international standard-setting for REDD+ in this area.⁷⁶

Against this background, the EU has actively pursued the development of REDD+ safeguards in the context of the CBD, highlighting the need for mutual supportiveness between the international climate change and biodiversity regime with regard to forests. Notably, the EU not only advocated for the development under the CBD of advice on REDD+ safeguards, but also called for the CBD Conference of the Parties (COP) to consider means of monitoring and assessing the impacts of REDD+ on biodiversity.⁷⁷ In 2012, CBD parties eventually agreed on advice on the application of relevant safeguards for biodiversity and the protection of the rights of indigenous and local communities to REDD+ activities. Such advice includes spelling out how CBD obligations specifically translate in the context of REDD+ activities: for instance, prioritizing the use of native communities of species; avoiding invasive alien species or developing ecosystem and species vulnerability assessments; and applying the ecosystem approach to identify sites of high biodiversity value so as to prioritize their conservation.⁷⁸ CBD Parties also recommend that national experience in implementing the certain previous CBD guidelines be taken into account, such as on forest biodiversity and protected areas,⁷⁹ biodiversity-inclusive impact assessment,⁸⁰ the ecosystem approach,⁸¹ the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity,⁸² the Akwé: Kon Guidelines on cultural,

⁷⁴ Savaresi, “EU External Action on Forests”, n. 59 above.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Earth Negotiations Bulletin, Summary of the Eleventh Meeting of the Conference of the Parties (COP 11) to the Convention on Biological Diversity, Volume 9, No. 595, 22 October 2012, 15, <<http://www.iisd.ca/download/pdf/enb09595e.pdf>> accessed 07 May 2013.

⁷⁸ CBD Decision XI/19, “Biodiversity and Climate Change Related Issues: Advice on the Application of Relevant Safeguards for Biodiversity with Regard to Policy Approaches and Positive Incentives on Issues Relating to Reducing Emissions from Deforestation and Forest Degradation in Developing Countries; and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries” (5 December 2012), Annex I.

⁷⁹ CBD Decision VI/22, “Expanded Programme of Work on Forest Biological Diversity” (22 May 2002), Annex; and CBD Decision VII/28, “Programme of Work on Protected Areas” (13 April 2004), Annex.

⁸⁰ CBD Decision VIII/28, “Voluntary Guidelines on Biodiversity-inclusive Impact Assessment” (15 June 2006).

⁸¹ Principles of the Ecosystem Approach, in CBD Decision V/6, “Ecosystem Approach” (22 June 2000), Annex B; and Refinement and Elaboration of the Ecosystem Approach, Based on Assessment of Experience of Parties in Implementation, in CBD Decision VII/11 “Ecosystem Approach” (13 April 2004), Annex I.

⁸² Addis Ababa Principles and Guidelines for the Sustainable use of Biodiversity, adopted by CBD COP Decision VII/12 (13 April 2004), Annex II.

environmental and social impact assessments⁸³ and the Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities.⁸⁴ Furthermore, CBD advice also includes safeguards for the full and effective participation of indigenous and local communities in relevant policy-making and implementation processes at national and subnational levels, considering traditional knowledge, clarifying tenure issues, ensuring an equitable distribution of benefits with communities, and sharing responsibility at subnational and local levels, including with communities.

Notwithstanding progress under the CBD, the politically sensitive nature of the EU proposal should be finally emphasized: negotiations on REDD+ under the CBD encountered fierce opposition from certain developing countries. Emerging economies, in particular, appeared to see through the EU agenda of ensuring “mutual supportiveness” between the international biodiversity and climate change regime, an attempt to place multilaterally-sanctioned conditionalities to the EU and its Member States’ support for REDD+ at the bilateral level.⁸⁵ These concerns are likely going to resurface in multilateral and bilateral contexts where REDD+ safeguards are discussed or put in practice.

Second case study: the EU efforts to promote, and to set standards for, the carbon market

It is argued that creating a price for greenhouse gas emissions would be one of the key ways to tackle climate change. According to the Stern Review, for example, “the key aim of climate-change policy should be to ensure that those generating greenhouse gases... face a marginal cost of emissions that reflects the damage they cause.”⁸⁶ As the first supranational emissions trading scheme for greenhouse gas emissions, the EU ETS constitutes a significant milestone in the evolution of European and global climate. In addition to launching the ETS, the EU has also been actively promoting carbon trading internationally, seeking to expand the carbon market both through the UNFCCC and through interlinked domestic and regional schemes.

While the EU ETS remains the most prominent example of greenhouse gas emissions trading, it is useful to bear in mind that it has experienced a number of serious challenges since it became operational in 2005. Most notably, setting the emissions cap at the right level to create an adequate price signal that effectively promotes low-carbon investment and innovation is proving to be a considerable challenge for the ETS. During the first trading period (2005-2007), the emissions cap was not based on monitored data and there was considerable over-allocation. For the second trading

⁸³ Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, in Article 8(j) and related provisions, CBD COP Decision VII/16F (13 April 2004).

⁸⁴ CBD Decision X/42 “The Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities” (29 October 2010).

⁸⁵ This point was made by Brazil in a contact group on REDD+ at the eleventh meeting of the Conference of the Parties to the CBD (October 2012, Hyderabad, India): personal notes on file with author Morgera.

⁸⁶ Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2006), 353.

period (2008-12), the cap was tightened – but at the end of 2011, there was a surplus of 950 million allowances due to the unexpectedly dire macroeconomic situation and increasing import of international credits.⁸⁷ Given that the banking of allowances between trading periods is possible, the use of international credits is allowed and emissions have dropped in the ETS sector, a continuous oversupply of allowances during most of the third trading period (2013-2020) looks highly likely. This means that the ETS is yet again failing to create an effective carbon price signal. The European Commission has therefore been exploring possibilities to intervene in the carbon market by reviewing the timeline for planned allowance auctions and ‘backloading’ allowances in order to limit their supply.⁸⁸ It has also investigated other options, such as permanently withholding the necessary amount of allowances⁸⁹ to create scarcity in the market. The Commission’s backloading proposal was, however, greeted with criticism by the industries covered by the ETS and by some key Member States. Also the European Parliament rejected the ‘backloading’ proposal in April 2013. Discussion about structural changes to the ETS therefore continues.

Lessons learned from the ETS, especially the reasons why the carbon price has remained too low, appear as valuable experiences for the EU to disseminate to the growing number of countries currently either planning or implementing national or sub-national emissions trading schemes, including Australia, Brazil, Chile, China, Costa Rica, India, Japan, Mexico, New Zealand, Republic of Korea and the US.⁹⁰

At the same time as it is trying to improve the effectiveness of the ETS internally, the EU continues to promote emissions trading through multilateral, minilateral and bilateral cooperation. It has made detailed proposals for a sectoral crediting and trading mechanism in the ongoing negotiations under the UNFCCC on the New Market Mechanisms established by the UNFCCC Parties in at the 2011 UN Climate Change Conference in Durban.⁹¹ As mentioned above, the EU is also negotiating with third parties, including Australia, California and Switzerland, for them to link their national schemes to the ETS. The European Economic Area (EEA) and European Free Trade Association (EFTA) countries (Norway, Liechtenstein and Iceland) already participate in the ETS. In its bilateral relations, the EU is giving financial support for countries like China that are in the process of developing their own trading schemes.

Interestingly, the EU has also taken action in such areas of climate policy where multilateral cooperation has been particularly difficult. In other words, the EU has tried to influence standard-setting for the international carbon market through its internal legislation. Failing to reach a satisfactory solution through multilateral negotiations, the EU has adopted internal sustainability standards for carbon credits that are stricter than those agreed under the UNFCCC. In concrete terms, the EU has

⁸⁷ Jos Delbeke, “Is the EU ETS Working? European Commission Perspective”, 26 September 2012, <http://ec.europa.eu/clima/news/docs/2012092801_ets_jd_en.pdf> accessed 07 May 2013.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ UNFCCC Executive Secretary Christiana Figueres, “Statement at the Carbon Forum North America”, 1 October 2012, available at: <http://unfccc.int/files/press/statements/application/pdf/20121001_carbon_forum_north_america.pdf> accessed 07 May 2013.

⁹¹ UNFCCC, “Views on the New Market-Based Mechanism. Submissions from Parties” UN Doc FCCC/AWGLCA/2012/Misc.6, 11 April 2012, at 7-16.

banned credits from afforestation and reforestation activities under the Kyoto Protocol's CDM from the EU ETS. It has also decided to ban credits from controversial industrial gas projects under the CDM. From May 2013 onwards, credits from projects that involve the destruction of trifluoromethane (HFC-23) and nitrous oxide (N₂O) are no longer eligible to comply with obligations under the ETS.⁹²

Most influential has been, however, the highly controversial decision that the EU took in 2008 to include emissions from foreign airlines alongside its internal aviation emissions into the ETS starting from 2012.⁹³ The question of emissions from international aviation and maritime bunker fuels has been debated multilaterally since the 1990s under the UNFCCC as well as within the relevant sectoral organizations, the ICAO and IMO. For global climate policy, the problem is that emissions from aviation and maritime transport are projected to increase manifold by 2050. Their growth is eating into the already severely constrained global carbon budget to limit the global average temperature increase to 2°C. As discussed above, a gap of 8-11 gigatons of carbon dioxide equivalent exists between emissions levels in 2020 to meet this target and the current climate policies.

After years of unfruitful debates at the UNFCCC, IMO and ICAO, the EU took in 2008 a decision to include aviation emissions into the ETS from 2012 onwards.⁹⁴ It also decided to draw the boundaries of the scheme in such a way that it applies to all flights landing in, and taking off from EU airports. This has been controversial internationally given that the scheme also applies to foreign airlines. In fact, the independent action by the EU on international aviation emissions has subsequently given rise to a boiling international dispute whereby the EU has been accused of, *inter alia*, using unilateral trade measures and exercising extraterritorial jurisdiction in violation of international law,⁹⁵ and failing to adequately reflect the principle of common but differentiated responsibilities and respective capabilities in the design of its aviation scheme.⁹⁶

The EU's emissions trading scheme sets a cap for aviation emissions, calculated on the basis of the average of annual emissions in 2004-2006.⁹⁷ Airlines included in the scheme must also have in place a system for the annual monitoring and reporting of their greenhouse gas emissions.⁹⁸ Emissions are calculated based on the entire flight departing from or arriving at an EU airport, including for those parts of the flight that take outside the EU airspace. By the end of April each year, airlines included in the scheme are supposed to surrender allowances corresponding to their verified emissions in the previous year.⁹⁹ Directive 2008/101/EC also contains fairly strict

⁹² EU Press Release, "Commission Welcomes Vote to Ban Certain Industrial Gas Credits" IP/11/56, 21 January 2011 < europa.eu/rapid/press-release_IP-11-56_en.htm> accessed 07 May 2013.

⁹³ The following overview of aviation emissions is based on Kulovesi, "Addressing Sectoral Emissions outside the UNFCCC: What Roles for Multilateralism, Minilateralism and Unilateralism?" n. 5 above.

⁹⁴ Directive 2008/101 of the European Parliament and of the European Council amending Directive 2003/87 so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, [2009] OJ L8/3.

⁹⁵ For an overview of legal arguments in this regard, see Kulovesi, "International Aviation Emissions and the EU Emissions Trading Scheme", n. 14 above.

⁹⁶ Scott and Rajamani, n. 11 above.

⁹⁷ Directive 2008/101/EC, Articles 3c(1) and (2), Article 3s.

⁹⁸ Ibid., Article 3g.

⁹⁹ Ibid., Articles 6.2 and 16.3.

sanctions for non-compliance with the obligation to surrender emission allowances. Accordingly, airlines failing to surrender the required number of emission allowances will incur an excess-emissions penalty of €100 for each tonne of carbon dioxide (CO₂) equivalent emitted for which the airline has not surrendered allowances.¹⁰⁰ Such a payment will not release the airline from the obligation to surrender the missing allowances. Ultimately, a failure to comply with the Directive may lead to a decision by the European Commission that the airline in question is banned from operating in the EU.¹⁰¹

While the vast majority of foreign airlines complied with their first round of reporting obligations, the Commission drew attention to “systematic non-reporting” of their 2011 emissions by ten commercial airlines based in China (eight) and India (two).¹⁰² Such early non-compliance with their ETS obligations by Chinese and Indian airlines relates to broader international legal and political opposition to the EU’s decision to include foreign airlines into its trading scheme. As a first legal step in the battle against the inclusion of aviation emissions in the EU ETS in 2009, American Airlines, Continental Airlines, United Airlines and the Air Transport Association of America (ATAA) challenged the legality of the scheme’s extraterritorial reach through UK courts. This led to a request for a preliminary ruling from the Court of Justice of the European Union (CJEU) concerning the validity of Directive 2008/101/EC in light of its alleged incompatibility with certain rules and principles of international law, namely:

- (a) The principle of customary international law that each state has complete and exclusive sovereignty over its air space;
- (b) The principle of customary international law that no state may validly purport to subject any part of the high seas to its sovereignty;
- (c) The principle of customary international law of freedom to fly over the high seas;
- (d) The principle of customary international law that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty;
- (e) The Chicago Convention on International Civil Aviation (in particular Articles 1, 11, 12, 15, and 24);
- (f) The Open Skies Agreement (in particular Articles 7, 11.2(c), and 15.3), which is an agreement between the United States and the EU and its member states aiming to open up air-transport markets; and
- (g) the Kyoto Protocol (in particular, Article 2.2).¹⁰³

In December 2011, the CJEU affirmed the validity of Directive 2008/101/EC, finding the Directive’s provisions to be compatible with international law.¹⁰⁴ However, the outcome failed to satisfy key foreign countries whose airlines are covered by the scheme.

¹⁰⁰ Ibid., Article 16.3.

¹⁰¹ Ibid., Articles 16.5-16.12.

¹⁰² European Commission Press Release, “Emissions Trading: Annual Compliance Round-up Shows Declining Emissions in 2011”, (IP/12/477) 15 May 2012), <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/477>> accessed 07 May 2013.

¹⁰³ CJEU, Case C-366/10, *The Air Transport Association of America, American Airlines, Inc., Continental Airlines, Inc., United Airlines, Inc. v The Secretary of State for Energy and Climate Change* [2011] OJ C260/9 (‘Case C-366/10’), Reference for a Preliminary Ruling from High Court of Justice Queen’s Bench Division (Administrative Court) (United Kingdom) made on 22 July 2010.

¹⁰⁴ Ibid.

A coalition of some 27 countries, including Brazil, China, India, Russia, South Africa and the US, then emerged, to oppose the inclusion of international aviation emissions in the EU ETS.¹⁰⁵ Some of them went as far as to adopt internal measures to prevent their airlines from complying with the EU scheme. In the US, the ‘European Union Emissions Trading Prohibition Act of 2011’ was designed prohibit US-based airlines from participating in the ETS. The bill passed the House of Representatives in October 2011¹⁰⁶ and in September 2012, the counterpart bill passed the Senate. As a result, the diplomatic conflict between the EU and the US on climate policy reached new highs in the autumn of 2012. Also China prohibited its airlines from participating in the ETS and increasing fares or imposing other charges as a result of the scheme, and India instructed its airlines not to participate in the scheme.¹⁰⁷

The escalating international row around the ETS resulted in a surprise announcement by Connie Hedegaard, European Commissioner for Climate Action in November 2012. Hedegaard indicated that the EU had decided to “stop the clock” for one year on the implementation of the international aspects of aviation under the EU ETS.¹⁰⁸ In practice, this means that the EU will not require allowances to be surrendered in April 2013 concerning emissions from flights to and from the EU during 2012.¹⁰⁹ In 2012, the aviation scheme will therefore only apply to internal flights within the EU. While the Commission’s announcement attempted to justify the move by alluding to positive developments at the ICAO and desire to create a positive atmosphere for international negotiations, there has been plenty of speculation concerning the ‘real reasons’ behind the EU’s decision. For one, key countries do not seem prepared to let go of their opposition to a compulsory international market mechanism for aviation emissions.¹¹⁰ Rumors are also ripe that the Commission’s decision to stop the clock was influenced more by concerns voiced by powerful EU Member States over the economic implications of the scheme than by positive developments at the ICAO.¹¹¹ It will be therefore interesting to see what strategy the EU will employ after the one-year deadline runs out in the autumn of 2013.

At this stage, the legal and political drama around the EU trading scheme for aviation emission goes to show that international standard-setting can be politically highly controversial – and very difficult even for powerful players like the EU. Regardless,

¹⁰⁵ International Centre for Trade and Sustainable Development, “Opponents of EU Aviation Carbon Law Agree on Possible Countermeasures” *Bridges Weekly Trade News Digest* (22 February 2012) <<http://ictsd.org/i/news/bridgesweekly/126278/>> accessed 07 May 2013.

¹⁰⁶ H.R. 2594 European Union Emissions Trading Prohibition Act of 2011.

¹⁰⁷ “China ‘Bans’ Airlines from Joining EU Carbon Scheme”, *BBC News* (6 February 2012), <<http://www.bbc.co.uk/news/business-16901106>> accessed 07 May 2013; International Centre for Trade and Sustainable Development, “India Confirms Boycott of EU Aviation Emissions Rule”, *Bridges Weekly* (29 March 2012) <<http://ictsd.org/i/trade-and-sustainable-development-agenda/129985/>> accessed 07 May 2013.

¹⁰⁸ Stopping the clock of ETS and aviation emissions following last week’s International Civil Aviation Organisation (ICAO) Council, MEMO/12/854, 12 November 2012.

¹⁰⁹ *Ibid.*

¹¹⁰ John Parnell, “BASIC countries threaten to block aviation emissions deal” 20 February 2013, Responding to Climate Change (RTCC) <<http://www.rtcc.org/basic-countries-threaten-to-block-aviation-emissions-deal/>> accessed 07 May 2013.

¹¹¹ Barbara Lewis and Valerie Volcovici, “US, China turned EU powers against airline pollution law”, 10 December 2012, Reuters, <<http://www.reuters.com/article/2012/12/10/us-eu-airlines-climate-idUSBRE8B01H20121210>> accessed 07 May 2013

there are strong legal and environmental justifications for the EU's approach towards aviation emissions. Our argument here is that this type of minilateralism could, in theory, be useful in advancing multilaterally agreed objectives, including the global goal of limiting temperature increase to 2°C – provided that it complies with the relevant norms of international law and seeks justification through multilateral fora.

Conclusions: challenges ahead

The EU is a unique actor in the international setting - and it has also devised a uniquely complex strategy to support its international climate change standard-setting. The reliance by the EU on mini-lateral and bilateral approaches in climate standard-setting is understandable given that multilateral climate cooperation continues to struggle even when urgent measures would be needed to tackle climate change. Scientific estimates show that global greenhouse gas emissions must be reduced already by 2020 in order to have a reasonable chance of meeting the 2°C target and avoiding dangerous anthropogenic climate change,¹¹² which are both goals agreed multilaterally by the 195 Parties to the UNFCCC. However, as explained above, the current measures to mitigate greenhouse gas emissions pledged by countries under the UNFCCC are estimated to result in more than 3°C of warming by 2100. The EU's chosen strategy of minilateralism and bilateralism seems justifiable given its objective of advancing goals agreed multilaterally under the UNFCCC.

At the same time, however, the EU must be able to respond to criticism that through its standard-setting, it unilaterally imposes its own view of international law on third countries,¹¹³ sparks unhealthy regulatory competition,¹¹⁴ fails to respect international legal principles, such as the principle of common but differentiated responsibilities and respective capabilities,¹¹⁵ pursues its own competitiveness agenda¹¹⁶ or raises human rights concerns beyond its borders.¹¹⁷

In our view, when assessing the legitimacy and success of the EU as a global leader that promotes the development of international climate change standards, the Union's peculiarities as a global environmental actor should be taken into account. First of all, the Union's tendency to establish and institutionalise long-term external governance systems, often based on regulatory frameworks detailing common goals and participatory guarantees, creates conditions for easily exposing the pursuance of self-interest as opposed to the EU's "purported commitment" to partnership and collective decision-making.¹¹⁸ Second, the EU's constitutional requirement for coherence in its external policy translates into a legal obligation for the Union to "actively pursue" a multiplicity of objectives, including environmental protection at different levels, human rights and trade liberalisation – all under the overall ambit of contributing to

¹¹² UNEP, *Bridging the Emissions Gap*, n. 9 above.

¹¹³ Scott and Rajamani, n. 11 above; Marín Durán, "Environmental Integration in EU Development Cooperation", n. 35 above.

¹¹⁴ Kulovesi, "International Aviation Emissions and the EU Emissions Trading Scheme", n. 14 above.

¹¹⁵ Scott and Rajamani, n. 11 above, 469.

¹¹⁶ Gracia Marín Durán, "The Role of the EU in Shaping the Trade and Environment Regulatory Nexus: Multilateral and Regional Approaches" in Van Vooren et al., n. 33 above.

¹¹⁷ Daniel Augenstein, "The Human Rights Dimension of Environmental Protection in EU External Relations Post-Lisbon" in Morgera, *The External Environmental Policy*, n. 3 above.

¹¹⁸ Grainne De Burca, "EU External Relations: The Governance Mode of Foreign Policy" in Van Vooren et al., n. 33 above, 56-58.

multilateralism.¹¹⁹ This makes at the same time the EU's role in the global fight against climate change more ambitious, potentially more balanced but also an easy target for criticism arguing that the EU does not respect its own basic rules. Furthermore, the special nature of the EU as an international actor whose negotiating position is inherently inflexible due to the fact that it is the result of lengthy intra-EU negotiations between its 27 Member States,¹²⁰ is further compounded by the increasing interaction between internal environmental regulation and external relations.¹²¹

Ultimately, the legitimacy question of the EU's reliance on minilateralism and bilateralism (as opposed to unilateralism) as a constructive and complementary path towards international standard-setting on climate change rests on demonstrations of good faith. With all its legal peculiarities and unique constraints, the EU still needs to show to third countries individually and to the international community as a whole that it respects the international legal order and takes into account the reasonable expectations of the other members of the international community.¹²² This means protecting the reasonable interests of other States that arise from the appearances created by the bilateral or minilateral behavior of the EU.¹²³ In other words, it implies the need for the EU to show trustworthiness and predictability¹²⁴ in how it develops and uses its bilateral and minilateral approaches to support multilateralism. It calls for the EU to show a "genuine intention to achieve a positive result"¹²⁵ in supporting global climate change standard-setting. Demonstrating good faith, thus, necessitates systematic respect for multilateral norms as well as reliance on multilateral institutions that are essential to the effective, objective and evenhanded promotion and protection of the international community's interests.¹²⁶ To this end, the legitimacy of EU efforts to influence and support international climate change standard-setting rests on continued responsiveness to developments within the multilateral framework, including the determinations by multilateral environmental agreements' governing and compliance bodies relating to the link between financial solidarity, capacity building, and compliance,¹²⁷ particularly in balancing the use of trade incentives and avoiding 'upsetting' multilateral determinations of common but differentiated responsibilities through bilateral routes.¹²⁸

¹¹⁹ Article 21 TEU; see, further, Joris Larik, "Entrenching Global Governance: The EU's Constitutional Objectives Caught Between a Sanguine Worldview and a Daunting Reality" in van Vooren et al., n. 33 above.

¹²⁰ Päivi Leino, "The Journey Towards All That is Good and Beautiful: Human Rights and 'Common Values' as Guiding Principles of EU Foreign Relations Law" in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law* (Hart Publishing, 2008), 279.

¹²¹ Marise Cremona, "Expanding the Internal Market: An External Regulatory Policy for the EU?" in van Vooren et al., n. 33 above.

¹²² Markus Kotzur, "Good Faith" Max Planck Encyclopedia of International Law (OUP, 2012), para. 4.

¹²³ Michel Virally, "Review Essay: Good Faith in Public International Law" (1983) 77 *American Journal of International Law* 130.

¹²⁴ Saul Litvinoff, "Good Faith" (1997) 71 *Tulane Law Review* 1645, 1664.

¹²⁵ ICJ, Gulf of Maine case, [1984] ICJ Rep 246, para. 87.

¹²⁶ Bruno Simma, "From Bilateralism to Community Interests in International Law" (1994) IV 250 *Recueil des Cours* 217, 319.

¹²⁷ Elisa Morgera, "Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action" in Van Vooren et al. n. 33 above.

¹²⁸ Elisa Morgera, "Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law" (2012) 23(3) *European Journal of International Law* 743; and Kulovesi, "Addressing Sectoral Emissions outside the UNFCCC", n. 5 above.

List of Acronyms

ATAA	Air Transport Association of America
CBD	Convention on Biological Diversity
CCS	Carbon Capture and Storage
CDM	Clean Development Mechanism
CO ₂	Carbon dioxide
COP	Conference of the Parties
CJEU	Court of Justice of the European Union
EEA	European Economic Area
EFTA	European Free Trade Association
ETS	Emissions Trading Scheme
EU	European Union
FAO	Food and Agriculture Organization
FLEGT	Forest Law Enforcement, Governance and Trade
GHGs	Green House Gases
HFC-23	Trifluoromethane
ICAO	International Civil Aviation Organization
IMO	International Maritime Organization
MEAs	Multilateral Environmental Agreements
N ₂ O	Nitrous Oxide
REDD+	Reducing Emissions from Deforestation and forest Degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stock in developing countries
UNFCCC	United Nations Framework Convention on Climate Change
VPAs	Voluntary Partnership Agreements